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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CARLOS A. TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly imposed a sentence above the applicable Sentencing Guideline range because petitioner's criminal history category did not adequately reflect the seriousness of his past criminal conduct.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A10-A13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1989. The petition for a writ of certiorari was filed on June 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of Texas to one count of forcibly impeding a United States Customs Officer while engaged in and on account of the performance of his duties, in violation of 18 U.S.C. 111. He was sentenced to 18 months' imprisonment, to be followed by a one-year term of supervised release.

1. Petitioner was indicted on August 24, 1988, on two counts of forcibly impeding a United States Customs Officer, in violation of 18 U.S.C. 111; on one count of importing 15.5 grams of marihuana into the United States from Mexico, in violation of 21 U.S.C. 952(a); and on one count of possessing 15.5 grams of

marihuana, in violation of 21 U.S.C. 844(a). 1 R. 16-17. On September 23, in exchange for the government's dismissal of the remaining counts, petitioner pleaded guilty to one count of forcibly impeding a Customs Officer. 1 R. 8, 13; 2 R. 5-6. The factual basis for the plea stated, 2 R. 10-11:

> On August 14, 1988, * * * [petitioner] entered the United States at the Port of Entry at Brownsville. After a negative declaration he was sent over to secondary inspection. When the canine dog alerted on his vehicle, [petitioner] attempted to flee back on foot to Mexico. And in the process he knocked down Joe Silva, a United States Customs Officer, while Mr. Silva was on duty and was trying to stop [petitioner] from running back to Mexico.

2. a. Under 18 U.S.C. 3553(b)(Supp. IV 1986), the sentencing court is required to impose sentence in accordance with the sentencing guidelines promulgated by the United States Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) (Supp. IV 1986) unless the court "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The applicable guideline range for an offense is determined, first, by calculating the base offense level for the offense under Chapter 2 of the guidelines; second, by making any appropriate adjustments under Chapter 3 for injury to victims of the crime, the defendant's role in the offense, and obstruction of justice; and, third, by determining the applicable criminal history category under Chapter 4. The applicable sentencing guideline range is determined from the Sentencing Table in Chapter 5, Part A, by finding on the grid the point at which the adjusted offense level intersects with the applicable criminal history category.

Sentencing Guideline § 4A1.1 provides that from one to three points are included in the criminal history score for each previous offense committed by the defendant, depending upon the length of any sentence of imprisonment imposed. United States Sentencing Comm'n, Guidelines Manual § 4A1.1(a)-(c) (Oct. 1987) [hereinafter Sentencing Guidelines]. Additional points are added

if the instant offense was committed while the defendant was serving a sentence, or if the instant offense was committed within two years of the defendant's release from a prison term of at least 60 days. § 4A1.1(d), (e). Certain offenses are not included in the calculation, including sentences for adult convictions of a juvenile under 18 years of age at the time of the offense if no prison term was imposed. See Commentary on Sentencing Guideline § 4A1.1(c).

Sentencing Guideline § 4A1.3 permits the sentencing court to depart from the applicable guideline "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes * * *." Under Section 4A1.3, the court may consider such factors as whether the defendant committed the offense while he was awaiting trial, sentencing, or appeal on another charge, and whether the defendant engaged in similar adult criminal conduct that did not result in a conviction.

b. The Probation Office determined that, under the sentencing guidelines, petitioner's total offense level was 6 and his criminal history category was III. The offense level was based on a six-point base offense level under the Minor Assault guideline, Sentencing Guideline § 2A2.3, plus two points under Sentencing Guideline § 3C1.1 for obstruction of justice because of petitioner's attempt to flee, minus two points for acceptance of responsibility under Sentencing Guideline § 3E1.1(a), because petitioner readily acknowledged his involvement in the offense. Pet. 4.

The criminal history score was calculated under Sentencing Guideline § 4A1.1. Section 4A1.1(c) required that petitioner be charged with one point for unlawfully carrying a weapon, for which petitioner received a 30-day jail term, and Sentencing Guideline § 4A1.1(a) required that petitioner be charged with three points for burglary of a vehicle, for which he received a two-year term of imprisonment. Under the Sentencing Table, Ch.

5, at 5.2, a criminal history score of four points places the defendant in Criminal History Category III. The applicable guideline range for a defendant with an offense level of 6 and a Criminal History Category of III is two to eight months' imprisonment.

The records presented to the sentencing court included at least four additional criminal incidents that are not reflected in petitioner's criminal history score under Sentencing Guideline § 4A1.1. First, petitioner was convicted at the age of 17 as an adult for a Class A theft committed on April 27, 1982, and was fined $150. Second, petitioner was convicted at the age of 17 as an adult for the unauthorized use of a motor vehicle on June 30, 1982. He was given a suspended sentence of three years' imprisonment, placed on probation for three years, and ordered to pay $540 in probation costs, $75 in court costs, and $200 in attorney's fees. Petitioner was sentenced on October 29, 1982, and absconded from supervision in March 1983. He was arrested for the probation violation in January 1987 in connection with his arrest on a new offense. Although a motion to revoke petitioner's probation was filed, that motion was dismissed after a friend of petitioner paid the probation costs. Third, petitioner was arrested in January 1988 for felony possession of marijuana and three traffic violations. The drug charge was dismissed, and petitioner was fined a total of $134 for the traffic violations and given credit for time served. Finally, petitioner was arrested on May 14, 1988, for possession of marijuana. That arrest arose after police responded to a report that an automobile theft was in progress and petitioner fled from the scene on foot. The marijuana possession was charged as a misdemeanor, and the attempted auto theft was not pursued. The charge was pending on the date of petitioner's sentencing in this case.

Although the presentence investigation report noted that the Sentencing Guideline applicable to petitioner's offense prescribed a term of imprisonment of two to eight months, the report recommended an upward departure from the guideline

sentence. Because of the seriousness of petitioner's criminal history, the report recommended a sentence of 18 months' imprisonment. Pet. App. 11A.

3. At the November 11, 1988, sentencing hearing, the district court imposed the 18-month sentence that had been recommended in the presentence investigation report. The court stated that it was departing from the sentencing guidelines because of petitioner's past history. Pet. App. 15B. After noting that petitioner was in danger of being treated by the State as an habitual offender if he were convicted again and that he needed counseling, the court stated that, id. at 16B:

> I want the record to show that I am departing because of the fact that although the particulars in this incident * * * are not aggravating * * * a look at [petitioner's] prior involvements and his prior convictions and his general demeanor and conduct certainly call for consideration by which he needs to conform his conduct to abide by law.

The court also stated that, id. at 17B:

> I don't agree with the guidelines because of their assessment of prior involvement in giving the points. By that standard, for example, a person could have ten convictions and they only give two or three points. I don't agree with that. You have got to look at each case separately.

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 10A-13A. The court found that, although the district court could have been more explicit about its reasons for departing from the guidelines, it was apparent from the record as a whole that the district court departed from the guidelines in accordance with the provisions of Sentencing Guideline § 4A1.3, which authorizes a departure if "the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." Pet. App. 11A-13A.

ARGUMENT

Two days after this case was decided by the Fifth Circuit, that court decided United States v. Lopez, 871 F.2d 513 (1989). In Lopez, the Fifth Circuit held that in determining whether to depart from the Sentencing Guidelines because the defendant's criminal history score does not adequately reflect the serious-

ness of his past criminal conduct or the likelihood that he will commit further crimes, the district court must determine the appropriate sentence by reference to the applicable sentencing guideline range for the most nearly analogous criminal history category. Petitioner notes (Pet. 6-8) that the district court did not make such a determination on the record in this case. The district court's departure from the procedure subsequently required by the court of appeals in Lopez did not prejudice petitioner, however, because it is clear that the district court would have imposed the same sentence if the court had followed the Lopez procedures.

Under Sentencing Guideline § 4A1.3, the district court may depart from the guidelines "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." The commentary to Section 4A1.3 states (Sentencing Guidelines 4.9):

> In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly underrepresents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with a Category IV criminal history, the court should look to the guideline range specified for a defendant with a Category IV criminal history to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for a Category VI criminal history is not adequate to reflect the seriousness of the defendant's criminal history.

Thus, as the Fifth Circuit stated in United States v. Lopez, supra, the Sentencing Commission contemplated that in imposing sentence in a case in which the criminal history category inadequately reflects the seriousness of a defendant's criminal history or his likelihood of recidivism, the district court should select the most nearly applicable criminal history category and employ the sentencing range that applies to that category rather than simply impose a sentence above the otherwise applicable range. See United States v. Cervantes, No. 89-1002

(2d Cir. June 14, 1989); United States v. Miller, 874 F.2d 466, 471 (7th Cir. 1989).

Nevertheless, a remand for further findings is not required in this case. Where the record reflects that the sentence imposed clearly falls within the appropriate range, no remand has been ordered even where the district court did not expressly consult the criminal history category that most closely resembles that of the defendant. See, e.g., United States v. Sturgis, 869 F.2d 54, 57 (2d Cir. 1989); United States v. DeLuna-Trujillo, 868 F.2d 122 (5th Cir. 1989). Compare United States v. Cervantes, supra; United States v. Burch, 873 F.2d 765 (5th Cir. 1989); United States v. Lopez, supra; United States v. Miller, supra (remand where result "may turn out to be about the same"). [1]

The record in this case makes it clear that the district court would impose the same sentence on remand that it imposed in the first instance. The record shows that the court considered as grounds for departure elements of petitioner's criminal history that support the imposition of an 18-month term of imprisonment. As the court of appeals explained, Pet. App. 11A:

> Under the sentencing guidelines, [petitioner] was assessed criminal history points for his previous conviction on a 1986 weapons charge, and his conviction in 1988 for burglary of a vehicle. No points were assessed for his 1982 conviction for the unauthorized use of a motor vehicle, for which he received a three-year suspended sentence, or for his 1982 conviction for theft, for which he was fined, because both offenses occurred when he was less than eighteen years old (seventeen) and more than five years before the incident giving rise to the federal charge. See Sentencing Guidelines § 4A1.2(d)(2). [Petitioner] also had a state charge of marijuana possession pending at the time of the federal offense.

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[1] To the extent that petitioner complains that the decision below conflicts with the Fifth Circuit's subsequent decision in United States v. Lopez, supra, he relies on an intra-circuit conflict, which does not call for review by this Court. See Wisniewski v. United States, 353 U.S. 901 (1957). Petitioner could have sought rehearing by the panel or rehearing en banc by the full Fifth Circuit, but he did neither. Moreover, the unpublished decision below has no precedential value within the Fifth Circuit, see Fifth Circuit Local Rule 47.5, as the court below recognized, see Pet. App. 10 n.* (quoting Fifth Circuit Local Rule 47.5).

If the two 1982 offenses had been committed when petitioner was 18 rather than 17 or if petitioner had received even a brief prison term for those crimes, he would have received at least 1 point for each offense under Sentencing Guideline § 4A1.1. If the motion to revoke petitioner's probation for absconding from supervision had not been dismissed when someone else paid petitioner's probation costs, the 1982 vehicle offense would have resulted in 3 points toward petitioner's criminal history score, rather than 1 point or none. Sentencing Guidelines §§ 4A1.1(a) and 4A1.2(k). If petitioner had been sentenced for the 1988 burglary of a vehicle two weeks earlier than he was, he would have received 2 additional points for the instant offense, since his assault offense would have been committed after his sentencing for the burglary. Sentencing Guidelines § 4A1.1(d). [2] Furthermore, petitioner had a separate marijuana possession charge pending at the time of sentencing, which would have warranted an addition of at least 1 point. Finally, the instant offense was committed less than two years after petitioner was released from custody on the 1986 weapons charge. Thus, if the 1986 sentence had been 60 days' imprisonment instead of 30, petitioner's criminal history score would have been increased by 2 points. Sentencing Guideline § 4A1.1. In sum, the record supports a departure from the applicable guideline by employing a Category VI criminal history score, because petitioner's criminal history is closely analogous to that of a defendant whose criminal history score under Section 4A1.1 is at least 9 points higher than petitioner's.

Apart from the departure based on the most closely analogous criminal history, petitioner's sentence could have been increased on account of the marijuana importation that was part of the same course of conduct as the assault on the Customs Officer.

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[2] Departure under such circumstances is expressly authorized by Sentencing Guideline § 4A1.3(d) and (e). See United States v. Sturgis, 869 F.2d at 57 (sentence in range that would have applied if the defendant had been convicted of pending charges before rather than after sentencing on instant offense "not unreasonable under the particular circumstances").

Sentencing Guidelines §§ 1B1.3(a) and 2D1.1. Moreover, the district court would have been justified in departing upward in sentencing because petitioner's criminal history reflected repeated instances of similar conduct involving drugs and flight from law enforcement officers. The guidelines do not weigh the fact that a defendant's prior criminal conduct reflects a similar pattern; departure is therefore permissible in such cases, particularly when similar conduct occurs at increasingly frequent intervals, as in this case. See United States v. Diaz-Villafane, 874 F.2d 43 (1st Cir. 1989); United States v. Fisher, 868 F.2d 128 (5th Cir. 1989); United States v. DeLuna-Trujillo, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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